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# Disadvantaged Business Enterprise Program

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STATE OF MAINE  
DEPARTMENT OF TRANSPORTATION

**Policy Statement**

**Office of Commissioner**

**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

The Maine Department of Transportation (MaineDOT) is committed to engaging small disadvantaged, minority and woman-owned business enterprises as defined herein in all contracts to the maximum feasible extent, and will continue working to ensure the maximum feasible opportunity for these businesses to participate in contracts financed in whole or in part with federal funds.

The MaineDOT DBE Program has been carefully designed to incorporate 49 CFR Part 26, issued in February 1999, replacing 49 CFR Part 23, as amended. This new Program, as set forth herein, is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a "level playing field," and foster equal opportunity in US Department of Transportation-assisted contracts; improve the flexibility and efficiency of the DBE Program; and reduce burdens on small businesses.

In keeping with MaineDOT's multi-modal focus, responsibility for carrying out the Program is Department-wide. All MaineDOT will ensure that its contractors, subcontractors, and other parties indicated by federal law will meet the Program requirements. For guidance or questions regarding this Program, contact Alicia Kellogg, Director, or her designee, in Human Resources.

Additionally, MaineDOT recognizes the importance of small businesses in Maine's economy, and will work cooperatively with any and all other parties who also act in good faith to enhance development and growth opportunities of small businesses owned by disadvantaged individuals, minorities and women.

MaineDOT is committed to maintaining regular, open, constructive communication with both minority and majority interests. The Department continues to encourage frank and open discussions about the Program. I hope you will join with me and the Department's staff to ensure the success of this business development program. We need your input, ideas and experiences to enhance the growth of these businesses in Maine.

On behalf of the entire Department, we look forward to working with you.

Sincerely,



David A. Cole, Commissioner  
Maine Dept. of Transportation

November 26, 2003  
Dated

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## KEY INDIVIDUALS AT MAINE DOT

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Deputy Commissioner  
Bruce VanNote.....624-3000

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John Dority.....624-3000

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Alicia S. Kellogg, Director.....624-3050

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*As of 11//03*

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## ATTACHMENTS TO MAINEDOT DBE PROGRAM

Attachment A.	<b>*Annual Bidder Information and Contractor Survey</b> <i>(revised 3/00)</i>
Attachment B.	<b>* DBE Proposed Utilization Form - Consultant</b> <i>(revised 11/03)</i>
B.1.	<b>* DBE Proposed Utilization Form - Contractor</b> <i>(revised 11/03)</i>
Attachment C.	Prompt Payment Provision <i>(revised 3/00)</i>
Attachment D.	DBE Directory (sample version)
Attachment E.	Uniform Certification Application including Personal Networth Statement
Attachment F.	Maine Freedom of Information Act and Confidentiality of DBE Records
Attachment G.	MaineDOT Human Resources Organizational Chart
Attachment H.	MaineDOT DBE Mentor/Protégé outline (sample version)
Attachment I.	MaineDOT Regulation regarding Debarment
Attachment J.	<b>*DBE Semi-Annual Reporting Form</b>
Attachment K.	Glossary of Applicable Terms (49 CFR Part 26.5)
Attachment L .	<b>+DBE Imposed Goal Form and Directions</b>
Attachment M.	Appendix to 49 CFR 26, Individual Determinations of Social and Economic Disadvantage
Attachment N.	Appendix to 49 CFR 26, Guidance Concerning Good Faith Efforts
Attachment O.	Certification of Final Payment: All Modes

**\*Indicates Required Submissions for Contractors/Consultants**  
**+Applicable ONLY If MaineDOT Requires Project Specific DBE Goal**

**MAINE DEPARTMENT OF TRANSPORTATION  
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM  
49 CFR PART 26**

**Annual Program Overview**

**In accordance with 49 CFR Part 26, Maine Department of Transportation (MaineDOT) will annually establish a Disadvantaged Business Enterprise (DBE) participation level. The DBE participation level is determined annually and interested parties should contact the Civil Rights Coordinator to verify the current DBE aspirational goal.**

This program is applicable to all modal operations including: Highway, Transit, Aviation, and Rail (Northern New England Passenger Rail Authority by FTA decree).

To comply with 49 CFR Part 26, MaineDOT established a DBE Program Advisory group that met March through August 1999. The group membership included contractors, consultants, DBE/non-DBE firms, FHWA, and MaineDOT representatives. In addition, MaineDOT helped establish a State Highway Agencies work group from Rhode Island, New Hampshire, Vermont and Maine. State FHWA representatives and Eastern Resource Center staff participated. The group worked to cooperate, coordinate, and communicate on DBE matters germane to the program. This collaborative approach was beneficial to the States and end users because many Contractors/Consultants/DBE's work in one or more States and through sharing common experiences and by working cooperatively in overlapping areas of operation, Maine believes it can enhance the deliverer of our DBE program. States created and utilize a common uniform DBE Certification Application.

While nationally various complaints and challenges to the DBE Program have occurred, MaineDOT's historical experience does not reflect the national picture. Maine's DBE program has operated with industry stakeholders working together with the Department to carry out the program. This is not to say the program has not experienced bumpy roads; however, DBE firms and Contractors continue working together to improve professional and operational relationships in order to comply with the regulations.

This Program continues the spirit of partnership and goes beyond a dialogue on commercialism while continuing to support and provide a stakeholder with a network and texture to support their efforts to weave and stabilize DBE firm's presence into the fabric of the transportation industry. MaineDOT's program has been narrowly tailored such that *when* and *if* discrimination to DBE businesses is noted, remedies can be swiftly implemented to correct the specific discrimination. MaineDOT fundamentally believes that if DBE Program users respect the free market enterprise system, bid fairly and wisely, execute contractual agreements with an intent to provide and receive fair remuneration for quality work, and honor those business commitments without regard to race, color, sex, national origin, then in all ways MaineDOT's DBE program will achieve the desired result. However, absent continued and ongoing meaningful commitments by all parties to carry out this program, USDOT through 49CFR Part 26 requires MaineDOT to take specific remedial corrective action.

Because local market conditions impact the program through businesses starting up and just as fast shutting down; the number of firms certified and whom for a variety of reasons are no longer certified, the diminished number of firms getting certified through the program, and the seasonal nature of construction work impacts the pool of potentially eligible firms. In addition, on one side, restricting business opportunities to minority and female populations and, on the other side, long-standing business relationships which truncate other firms' opportunity to get a piece of the American dream contributed to sweeping regulatory changes which led to major program changes on a State level.

MaineDOT's challenge is to implement 49 CFR Part 26 in a flexible and effective manner in order that Maine's program is responsive. Historically, certain provisions of 49CFR Part 26 ~~will~~ undoubtedly impacted MaineDOT's ability to market merits of this program: the Personal Networth Statement, counting only work actually performed by the DBE, has on the current certified businesses, and potential elimination of certain work areas from credit (i.e. landscape, trucking, guard rail, flagging, and striping) have result in substantive changes but the program continues to evolve..

### **Program Applicability and Assurance: Section 26.13 Federal Financial Assistance Agreement**

MaineDOT has signed the following assurances, applicable to all US DOT-assisted contracts and their administration:

**Assurance: 26.13(a)** MaineDOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any US DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The MaineDOT shall

take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of US DOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by US DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the MaineDOT of its failure to carry out its approved program, the Department may impose sanction as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

This language will appear in financial assistance agreements with sub-recipients.

**Contract Assurance: 26.13b**

We will ensure that the following clause is placed in every US DOT-assisted contract and subcontract:

The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

This program supersedes all previous versions. MaineDOT affirms intentions to meet requirements of 49 CFR Part 26. MaineDOT generally intend to meet DBE participation levels by race and gender neutral applications. If and when, race and gender neutral efforts fail to achieve established DBE participation levels, contract goals will be implemented on a project-by-project basis. Contractors are required to take steps to achieve the race/gender neutral participation levels. Again, if race and gender neutral efforts do not yield the desired outcome, MaineDOT is required, by 49 CFR Part 26, to impose race and gender conscious goals which will be higher than the established participation level. Each bidder is individually responsible for knowing and complying with imposed race and gender conscious goals at bidding, award and execution of the contract. Failure to comply at bid, award or in execution of the work can result in bid reject, overturning of award or in termination of contract.

**Annual advertisement and implementation** will occur each year will 49CFR Part 26 remains in effect unless otherwise directed by USDOT. By end-July MaineDOT will advertise the upcoming Federal Fiscal Year Aspirational level. Implementation will occur by October 1 each year.



## **Federal Nondiscrimination Assurance**

MaineDOT does not and will not discriminate on the basis of race, color national origin, or sex in the award and performance of any MaineDOT/US DOT assisted contract or in the administration of 49 CFR Part 26. Further, MaineDOT ensures nondiscrimination in the award and administration of MaineDOT/US DOT assisted contracts as required in the regulation. 49 CFR Part 26, is to be incorporated by reference in all MaineDOT federal-assisted contracts. USDOT may impose sanctions as provided under part 26 and may, refer for enforcement purposes under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.) matters it deems necessary.

MaineDOT will not preclude or exclude any person or group from participation in, deny benefits of, or otherwise discriminate on basis of award.

## **DBE Program Applicability to Modal Entities**

This DBE program is applicable in all federal financially supported activities via Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) and Federal Transit Administration (FTA) including manufacturers and suppliers of transit and marine passenger/ vehicle vessels. Each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, must certify (49 CFR Part 26.13) that it has complied with these requirements. All FTA-assisted entities having or intending to have a contract including sub-recipients must comply and utilize MaineDOT's DBE Program. MaineDOT may, at its discretion, and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of transit vehicle manufacturers complying with this element of the program. Upon execution of each procurement opportunity, transit vehicle manufacturers are to furnish proof of compliance to MaineDOT. MaineDOT requires DBE Semi-Annual Inclusionary reports from all holders of contracts including transit vehicle manufacturers. Failure to comply can result in withholding of payment(s) (See Attachment List).

Recipients of other federal financial assistance for which DBE program requirements are necessary and who have historically relied (in whole or part) on MaineDOT's program including certification and the Directory of Certified Businesses are also expected to comply.

To this end, entities that work on or as part of MaineDOT federal-assisted projects must comply with 49 CFR Part 26.

### **DBE Financial Institutions**

There are no Minority or Women (DBE) Financial Institutions in Maine. However, we continuously search for services which assist the DBE community and when institutions are known, MaineDOT will publicize use of these services.

### **DBE Program Notice Publication**

MaineDOT will annually publish the DBE Participation level notice in the Kennebec Journal, Bangor Daily News, and the Portland Press Herald daily newspapers, and on MaineDOT's website. The Goal will be available for 30 days following the date of the notice. Persons wishing to make specific comments on the goals portion of the Program may do so for 45 days subsequent to the date of the notice.

### **Glossary of Terms**

Terms are found in 49 CFR §26.5. (See Attachment List). The following additional terms in this Program are defined below:

Capacity means the ability of a DBE as evidenced by past performance.

Disadvantaged Business Enterprise Proposed Utilization Plan means the reporting form Contractors and/or Consultants must furnish MaineDOT each time the firm is designated as the successful bidder/pro poser. The completed form reflects the firm's efforts to mainstream DBE firms in their project team.

Disadvantaged Business Enterprise Semi-Annual Reporting form means the reporting form Contractors/Consultants must furnish MaineDOT at the end of each reporting period for which they are under contract to MaineDOT.

Mentor/Protégé refers to a business arrangement whereby a Contractor assists a DBE firm through an MaineDOT approved learning program whereby the Contractor provides certain skills and resources (from bidding, estimating, administrative knowledge) in order to assist the DBE with business development.

Personal Net Worth refers to the net value of assets of an individual remaining after total liabilities are deducted, not including the individual's ownership interest in an applicant or participating DBE firm or the individual's equity interest in his/her primary place of residence or the business. An individual whose personal net worth exceeds \$750,000 is presumed not to be economically disadvantaged, and thus, can not be certified to participate in the DBE program.

### **Semi-Annual Program Reports-Contractor/Consultant Obligations**

All Contractors/Consultants are obligated to comply with this program will commence using the DBE Semi-Annual Report. (See Attachment List). Smi-Annual reports are to be furnished to MaineDOT's Equal Opportunity Office, see DBE Semi-Annual report schedule. Semi-Annual reports must: 1) cover the preceding operating period; 2) document actual payments made to DBE firms; 3) report non-DBE firms used during the period; and 4) report payments made to non-DBE firms.

Failure to provide the Semi-Annual report as cited above can result in withholding of progress estimates.

October 1-March 31	=	1 <sup>st</sup> Half Report Due April 7
April 1-September 30	=	2nd Half Report Due October 7

### **Process for Submitting DBE Work Plans on Bid Opening Day**

**For DBE Proposed Utilization Work Plans: Contractors** Low bidders must provide the information required by the DBE regulation that identifies what, *if any*, DBE firms are to be used on any given project, and must document/explain factors leading to the business decision. Even if the low bidder does not intend to utilize DBE firms, the low bidder is required to explain/document the decision by providing MaineDOT with the supporting

evidence. This can include DBE and non-DBE alike quotes, evidence of solicitation efforts (telephone/fax log) and communiqués in which firms are welcomed to bid.

Only the low bidder is obligated to provide this information. Completed forms must be provided to MaineDOT Contracts Section on Bid Opening Day. Low bidders may deliver their DBE Proposed Utilization Form electronically, by hand, or by Fax to: 624-3431. (See Attachment List).

**NOTE: Bidders DO NOT Present DBE Utilization Form to Human Resources.**

**All submissions go directly to Contracts Section.**

**Consultants** must provide information required by the DBE regulation that identifies what, *if any*, DBE firms are to be used on any given project, and must explain/ document the business decision which leads to this action. Firms must include their Proposed DBE Utilization Work Plan with each technical/price proposal and must explain DBE utilization decisions. Consultants must examine DBE opportunities, and advise MaineDOT of intended DBE utilization during each phase of “Scope of Work” discussion until MaineDOT accepts and awards the work. (See Attachment List).

**Supplementing Proposed DBE Utilization Form commitments:** Primes may alter DBE utilization efforts after award by submitting the DBE Utilization Form and checking off Revision. DBE changes resulting down sizing of a commitment, other than for scope of work changes imposed by MaineDOT, must be mutually agreed to by Contractor/Consultant and the DBE firm, and approved by MaineDOT project management and Human Resources prior to implementation. Changes for possession of a lower bid, after Primes have submitted DBE Utilization Work plans must occur in the same manner as detailed in the previous sentence. Absent mutually agreed written documentation supporting the change, MaineDOT will not allow the change for DBE credit purpose.

Proposed changes must be presented in writing and must be concurred to by both parties via a jointly signed letter. Letters must explain why the action is necessary, the cost impact, and what, if any efforts parties took to address the matter prior to determining a contract change was necessary.

**DBE Utilization Plans for MaineDOT Imposed Contractual Goals:** in these instances when MaineDOT determines that the overall DBE Participation level is not being met, MaineDOT will include contract goals. Bid Proposals will identify the desired goal and require bidder’s to

record DBE participation. The form must be part of the bidder's documents and must be submitted at the same time as the bid is presented for bid opening. When specific project goals are established, MaineDOT will only set DBE participation levels for a specific period in order to remediate DBE discrimination. Bidders must take and document those good faith effort steps taken to comply. Failure to comply will result in bid rejection. (See Attachment List).

When race/gender conscious goals are deemed necessary, the modal entity responsible for contract development, in consultation with the Office of Human Resources, will identify race/gender conscious levels on a project-by-project level. Corrective action goals will remain in place only until the desired DBE participation level is achieved. Actual performance levels, dollars paid and scope of work performed will be recorded as required on the DBE Semi-Annual Reports in the forenamed time frame and provided to Office of Human Resources.

After award, and as determined by MaineDOT, a Contractor/Consultant deemed to have failed in good faith to honor DBE commitments, will be subject to sanctions as contained herein.

Each MaineDOT modal entity's project manager is responsible for assuring Contractors/Consultants submit all Reports as required by 49 CFR Part 26, and/or by MaineDOT. Contractors/Consultants who do not comply can be subject to sanctions not limited to withholding of progress payments.

#### **Liaison Officer and Staff**

The DBE Liaison Officer is located within the Equal Opportunity unit of Human Resources. The DBE Liaison Officer, ~~she or her~~ designee has direct and independent access to the Commissioner, Chief Engineer, and Project Development Director in matters concerning the DBE program.

Operational matters concerning post awards, goal attainment, in-field problems, reporting and verification matters should be directed to this office.

DBE Directory updates, errors, omissions, and Semi-Annual Report submissions are directed to this office by fax at (207) 624-3051.

Address written inquiries to: Maine Department of Transportation, Human Resources, State House 16, Child Street, Augusta, Me. 04333-0016. Telephone inquiries to 207-624-3066 or fax inquiries to 207-624-3051.

**DBE Uniform Certification Application and Directory of Certified Businesses.**

MaineDOTs **Uniform Certification Application and Directory of Certified Businesses** can both be obtained online at MaineDOTs homepage at: [www.maine.gov/mdot/disadvantaged-business-enterprises/dbe-home.php](http://www.maine.gov/mdot/disadvantaged-business-enterprises/dbe-home.php) . In addition, firms can obtain written copy of MaineDOTs Directory of DBE firms by name, address, telephone/facsimile number, date of most recent certification, and the type of work performed by directly contacting MaineDOT's Office of Human Resources. However, the most current version is available on-line, at the above given address.

For those without Internet capacity, MaineDOT's Directory of Certified Businesses is available through print, as an attachment to each proposal, and directly from the Office of Human Resources. While the website version is regularly updated monthly, printed versions are updated quarterly (see Attachment List).

Those required to utilize MaineDOT's Directory of Certified Businesses are reminded to use the most current versions of the DBE Directory.

<b>Unified Certification Program</b>
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MaineDOTs is Maine's only DBE certification program. All USDOT modal entities, recipients and sub recipients including MPO, SPO and others must utilize MaineDOT's certification program including the application and directory of certified firms, and must accept certifications by MaineDOT (in and out-of-state alike).

MaineDOT welcomes any business applying for certification but general business applications will be considered a lesser priority than those applicants whose work can directly assist MaineDOT in meeting its stated transportation industry objectives. Applicants for MaineDOT certification will be only considered eligible under USDOT regulations, currently defined in 49 CFR Part 26 Subparts D and E.

**Certification process:** to be certified as a DBE, and for currently certified firms to remain in good status, a firm and the majority owner must meet all eligibility requirements including furnishing the Personal Net Worth Statement. Certification and recertification decisions are

based on the facts as a whole. As such, the burden of proof for all applicants and those seeking renewal must furnish all evidence required under 49 CFR Part 26. For information about the certification process or to request an application (see Attachment List), contact MaineDOT's Office of Human Resources, at (207) 624-3066 or go to MaineDOT Webpage at: [www.maine.gov/mdot/disadvantaged-business-enterprises/dbe-home.php](http://www.maine.gov/mdot/disadvantaged-business-enterprises/dbe-home.php) .

Applicants whose businesses homestate is Maine, and who submit a completed application will undergo both a paper audit and field audit interview (which will be held at the applicant's place of business). MaineDOT is under no obligation to either accept or consider any application which is not complete. Incomplete applications are not acceptable. The burden of proof to comply with all requirements of the application process is with the applicant. The applicant may elect to furnish a completed application or terminate the request for DBE certification until such time as a complete application can be presented.

**In-State applicants:** MaineDOT's DBE Certification processor will process certification applications including conducting both desk and field audits. All determinations to certification are issued by MaineDOT. Determinations are made within 90-days after the application and all supporting documents are accepted by MaineDOT.

Firms and their owners who fail to submit all necessary documentation may be afforded a one-time, 20-day extension to complete submissions. Applicants are exclusively responsible to furnish all information honestly, accurately and completely satisfy questions by MaineDOT in order to be fully considered for certification. Applicants failing to respond after the date of the aforementioned extension shall have all materials returned and MaineDOT will terminate the application process. An applicant may terminate MaineDOT's consideration of its application by requesting in writing that MaineDOT cease action and return all materials to the applicant.

If an applicant is granted MaineDOT certification, the firm will be notified in writing, will commence being listed in MaineDOT's DBE Directory; and will have full benefit of MaineDOT's DBE Program.

If an applicant is denied, he/she will receive written notification via certified mail explaining MaineDOT's determination, as it relates to 49 CFR Part 26 Subpart D and E. Without exception, if the applicant elects to "correct the record" he/she may reapply 12 months from the month/date that MaineDOT issued its denial memorandum. If the recipient believes MaineDOT erred in its determination, it may elect to Appeal MaineDOT's action to USDOT

(see Certification Appeal). However, MaineDOT's determination stands until such time as overturned by USDOT or the applicant reapplies and is granted certification.

**Out-of-state applicants:** MaineDOT practices reciprocity with only those entities certifying under 49 CFR Part 26. In order to apply, all out-of-state applicants must satisfy that they possess current homestate 49 CFR Part 26 certification status. Absent such current proof, MaineDOT will not consider an applicant, nor will any MaineDOT Contractor/Consultant receive DBE credit for work done by any firm not certified by MaineDOT prior to bidding said work. Applicants are required to apply using MaineDOT's Uniform Certification application (attachments/ documentation) are not necessary, **except** all out-of-state applicants must furnish proof of current home state DOT certification when applying for MaineDOT certification.

Out-of-state bidders are required to furnish proof of its homestate Department of Transportation certification prior to actually bidding/proposing MaineDOT work. Prime bidders are reminded when considering utilizing an out-of-state firm to have proof of home state Department of Transportation eligibility. No retroactive certification is allowed. Any firm (in or out-of-state) having current certification by US Small Business Administration (USSBA) will be certified by MaineDOT unless MaineDOT believes the firm is not eligible. In these cases, MaineDOT shall report findings to the appropriate certifying entity. These applicants must furnish proof of certification status at the time requesting MaineDOT status. Based upon current USSBA certification, MaineDOT will issue certification. Applicants must complete MaineDOT's application (excluding attachments) or provide a copy of USSBA's written certification recommendation, a narrative description of the firm's scope of work, and information about the firm's ownership, control, expertise or abilities.

Primes who carry non-MaineDOT certified firms for purposes of DBE credit will not receive credit for use of non MaineDOT certified DBE firms, and Primes may have their bid or proposal rejected for failure to demonstrate good faith effort (gfe) to meet the DBE program goal.

**Initial Certification denials:** any firm may appeal MaineDOT's decision directly to USDOT within 90 days of MaineDOT's action. Send appeals to US DOT with a copy to MaineDOT's Office of Human Resources. Address appeals to: US Department of Transportation, Office of Civil Rights, Certification Appeals Branch, 400 7th St., SW, Room 2104, Washington, DC 20590.

MaineDOT certification decisions are final unless overturned by US DOT.



**Removal or Decertification as DBE:** any firm may remove itself from the program at any time by written notice or by failure to respond to renewal obligations. When, MaineDOT intends to remove a Maine-based DBE's certification, MaineDOT will advise the DBE in writing, which will outline reasons for the action. DBEs are afforded an opportunity to present written/oral arguments as to why MaineDOT should not be decertified. Regardless of a DBE firm's desire to be heard, MaineDOT will schedule and conduct a review of the facts. Accordingly, the DBE will be advised of the date, time and place of the review. DBEs may be represented by Financial, Legal or business advocate. However, the DBE owner must be present at the fact review session, or when unable a duly notarized statement reflecting actual reasons for absence must be provided upon commencing the fact review session.

The DBE and MaineDOT will have one 30-minute period in which to present arguments. Written evidence followed by personal interviews are acceptable. Following initial arguments, each party will have a 10-minute rebuttal period. No fact(s) other than those cited in the initial review are admissible, and only those matters germane to and contained in MaineDOT's initial written letter will be allowed.

The presiding officer is the Director, Office of Human Resources, or designee. The presiding officer will issue a finding no later than 15 business days from the date the facts were heard. This action is final.

DBE firms failing to respond to annual renewal and in recertification obligations will not be reminded of their obligation. The obligation to satisfy annual obligations and recertification requirements is wholly the responsibility of the DBE firm.

All correspondence including notice of intent and the final statements are sent via US Postal Service, certified return receipt. DBEs refusing to accept notice are immediately removed without further action.

Reinstatement will not occur. Applying anew is required.

**Recertifications:** MaineDOT will review the eligibility of all Maine-based DBEs certified under former Part 23, to ensure they meet the standards of Subpart D of Part 26.

All Maine DOT certified DBE firms must submit in writing to MaineDOT, Office of Human Resources, any/all changes of circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26, or notice of any material changes in the

information provided with the owner's initial application for certification within 30 days of the sustentative change to eligibility.

**MaineDOT** requires all MaineDOT certified DBEs submit, annually on their certification date, a "no change" affidavit meeting the requirements of §26.83(j).

On or about the firm's annual certification date, MaineDOT's Office of Human Resources will provide the firm with the necessary renewal documents. The DBE shall comply not more than 30 days after receipt of the notification. MaineDOT will not issue notices of reminder beyond the initial notification. Failure to comply will result in removal of the firm's DBE status.

Failure to comply with these provisions will affect the firm's continuing eligibility as a MaineDOT certified business. All DBE responses must be in writing and must include the documentation.

Any firm not complying with provisions of recertification, will have only the work it is currently under subcontract(s) for counted toward any DBE goal. Failure to comply with any section of the above cited will cause MaineDOT to move to the Decertification/Removal procedure.

**Personal Networth Statement:** (PNWS) is incorporated in the Uniform DBE Certification Application. PNWS are also part of the owners continuing eligibility and at least annually the PNWS must be furnished. (See Attachment List). 49 CFR Part 26.67 Appendix E, requires owners who are married must also submit separate PNWS for that spouse, unless legally separated. Duplicate the form as necessary.

Once MaineDOT's Office of Human Resources completes review of the PNWS, the form will be returned directly to the business. Each owner is obligated to safeguard the document will be available to MaineDOT at any time it deems necessary to support certification or at any time US DOT requests the form. Failure to comply with any section of the above cited will cause MaineDOT to move to the Decertification/Removal procedure.

## Unit-by-Unit Program Responsibilities

TASK	RESPONSIBLE PARTIES
1. Collect & report statistical data as required by USDOT. Multi-modal quarterly and annual reports exclusive of goal setting	Human Resources, Planning, Environ. Services & Modal recipients
2. Review subcontracts & third party contracts & purchase requisitions for compliance with this program.	Human Resources, <del>Const.</del> , Project Development (Contracts), Planning, Environ. Services & Modal recipients
3. Work with all Bureaus to set overall annual goals.	Human Resources
4. Ensures bid notices & requests for proposals are available to DBE.	Contracts
5. Identifies contracts w/ goals & takes bids & monitors results.	Contracts
6. Analyzes MaineDOT progress toward meeting aspirational goal & identifies ways to improve progress.	Human Resources
7. Participates in pre-bid meetings.	Each mode as needed
8. Advises public & special interest groups of matters concerning opportunities for procurements/achievement/needs.	Human Resources
9. Determines contractor compliance with good faith efforts. Prepares monthly report of accomplishment toward race/gender neutral goal attainment. Where necessary adjusts goal accordingly.	Human Resources, Planning, Environ. Services & Modal recipients
10. Provides DBE with information and technical assistance.	Human Resources
11. Certifies DBEs (instate and use reciprocity for out-of-state firms according to criteria set by USDOT).	Human Resources
12. Prepares MaineDOT response on USDOT appeals of certification.	Human Resources
13. Provides outreach to DBE and community based organizations.	Human Resources
14. Maintains MaineDOT's Directory of Certified DBE.	Human Resources
15. Administrative reconsideration prior to award. Decision w/in 24 hours. Once decision is made, no appeal.	Director, Project Development
16. Provides/Responds to matters concerning Prompt Payment.	Project Development
17. Determines DBE credit to Primes for work.	Human Resources, Project Development, Planning, Environ. Services & Modal recipients
18. Determines noncommercially useful function in comparison with normal industry practices.	Human Resources, Project Development, Planning, Environ. Services & Modal recipients
19. Determines & applies DBE credit.	Human Resources, Project Development (Contracts), Planning, Environ. Services & Modal recipients
20. Annually approves long term DBE truck or equipment leases & advises project personnel.	Human Resources w/ copy to Project Development
21. Annually gather Bidders Information by end-April in order to analyze information for goal setting methodology.	Human Resources

## **Over concentration**

**MaineDOT has not determined an over concentration in any areas.** When evidence is noted, MaineDOT will take specific remedial steps. These may include but are not limited to reduced/no contractual credit for Contractors/Consultants who utilize businesses in over concentrated areas; some “incentive” benefit to Contractors/Consultants who expand/initiate new contracting arrangements with DBEs in non over concentrated areas; and public relations or marketing campaign to promote “other” business opportunities in the DBE program than those more traditionally known. The regulation identified five area of concern: landscaping, trucking, striping, flagging and guard rail.

MaineDOT does not know how compelling the cited work areas are to the Industry or if these are simply work areas which have historically been easier to achieve DBE participation. Questions are periodically raised to the appropriate utilization or commercially usefulness of DBE’s in these areas, and MaineDOT will attempt to better forecast the significance of DBE work in these areas to the overall project. MaineDOT may adjust the Program in response to the level of utilization of non-DBE firms in any area MaineDOT determines as being over concentrated. MaineDOT intends to conduct the research over the two primary construction seasons because Maine’s season is very short (between 90 and 120 days). Shorter computation time will not afford MaineDOT adequate time to gather, compute and develop appropriate measures to address problems.

Users are encouraged to promote DBE relationships which reflect the array of businesses represented in MaineDOT’s Directory of Certified Businesses.

## **DBE Business Development Program**

MaineDOT has a Mentor-Protégé program in which a number of DBE firms have acquired better knowledge and expertise. MaineDOT will continue this effort and will promote use among Contractors/Consultants and DBE firms.

Additionally, MaineDOT together with a MaineDOT (Maine based) DBE firm are federal appointees to Maine’s USSBA advisory group. As members they coordinate many industry concerns and resource requirements including to financial and banking representatives, other Federal and State Governmental entities and to private business concerns. Furthermore, MaineDOT and SBA-Maine Division are working cooperatively to improve quality and direct

service levels for small disadvantaged certified businesses. An informal open-ended cooperative agreement is in place whereby the SBA-Maine Division will target DBE firms for business development, niche marketing, financing and credit (such as short term cash flow assistance and working capital), business development planning, and in particular, SBA will expand direct construction industry services for DBE firms.

Prior to and since enactment of 49 CFR Part 26, MaineDOT was engaged in business awareness campaigns, working with community based organizations throughout Maine including Community Action Programs, regional or municipal Economic Development Offices; Refugee Resettlement Program, and several special interest groups such as Husson College's Family-Owned Business Center; Maine Centers for Women, Work and Community's Entrepreneurs program, and various Welfare-to-Work groups working to enhance entrepreneurship in Maine. Our mutual efforts include ongoing workshops (in multiple languages), speaker panels at conferences/workshops, job shadowing opportunities with established DBE entrepreneurs, specialty resources to assist DBEs, working with US SBA and other partners to promote entrepreneurship, utilizing Maine's premiere diversity publication, *Bridges, Opportunity Newsletter* and preparing multi-linguaged articles, and working with Maine Development Centers (University Maine system) to promote business ownership.

#### **Required Contract Clauses**

The following clause will appear in every federal contract.: "The Contractor or Subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as MaineDOT deems appropriate." (Quoted as cited in 49 CFR Part §26.13(b)).

#### **Prompt Payment**

In accordance with 49 CFR Part §26.29, MaineDOT will include the provision on Prompt Payment in every MaineDOT/USDOT assisted Contractor's contract. In addition, Section 104.5.2 of MaineDOT's Contract Provisions contains the actual requirements. Prompt Payment is applicable in every subcontract (DBE and non-DBE alike) and requires the Contractor to pay subcontractors for all work satisfactorily performed and invoiced no later than 30 days from the date the Contractors receives payment from MaineDOT for that subcontractor's work.

Retainage must be returned to the subcontractor within 30 days after the date that the subcontractor's work is satisfactorily completed. (See Attachment C)

All Contractors/Consultants are still required to complete and submit the former DBE Goal Attainment Verification form, now renamed "Certification of Final DBE Payment".

Disputes involving subcontractor payments are codified in Maine State Statute: 23§ 52-A. 2. Settlement of claims by subcontractor. Further, MaineDOT Standard Specifications, at 104.5 Prompt Payment, A. Pay When Paid, and B. Retainage, the Department clearly states Contractor's duties and liabilities under the contract. (See Attachment List).

### Monitoring and Enforcement Mechanisms

MaineDOT will advise US DOT of false, fraudulent, or dishonest conduct in connection with the program so US DOT can take any and all necessary steps up to and including any criminal or civil actions warranted as provided in the regulation and Maine State Law (see Attachment List).

### Good Faith Efforts

**Pre-Award GFE:** When MaineDOT determines the overall Aspirational goal is not being achieved and MaineDOT Imposed Contract goals are required, MaineDOT will identify the DBE goal in bid documents. In these instances, Contractor DBE inclusionary results as recorded on the **DBE Imposed Contract** form is considered part of a bidder's responsiveness. Should MaineDOT's Contracts section find the submission appears lacking in effort, it will advise the bidder's designated official as soon as possible after bid opening. The Low Bidder will be afforded the opportunity to demonstrate why a good faith effort finding is warranted. This review will be conducted by the Project Development Director, or designee. The low bidder must request a review, in writing, by close of business on the same day in which bid opening occurred. A formal review will occur within 24 hours of receipt of the written request for reconsideration. Requests must include representation of facts. Only matters outlined in this request will be considered. The Director of Project Development, or designee **will** make the determination of findings known not later than 5 business days from the date the reviewed by MaineDOT's Director, Project Development occurred. All determinations by MaineDOT are final and cannot be appealed to US DOT. For additional information bidders may consult 49 CFR Part 26, Appendix A-Guidance Concerning Good Faith Efforts. (See Attachment List).

Faxed or Hand Delivered requests to: Contracts at 207-624-3430. Hand delivered requests must be addressed Director, Project Development, c/o Contracts Section, #16 State House Station, Augusta, ME 04333-0016.

**Post-Award GFE:** When a Contractor believes a DBE is unable/unwilling to meet the contract terms the Contractor must document steps taken to advise the DBE of its intentions relative to continuing/terminating the subcontract. When a Contractor, in conjunction with MaineDOT Project Management believes non good faith effort is evident, the Contractor may take necessary steps to correct the deficiency up to and including termination of the subcontract.

No Contractor will be penalized for shortfalls arising from a DBE's unwillingness/inability to honor subcontract arrangements provided the Contractor can demonstrate to MaineDOT's Office of Human Resources that it acted diligently to communicate (in writing) their concerns, conducted itself in a customarily acceptable business manner and has not arbitrarily acted to remove and DBE without cause, documented efforts to assist the DBE in fulfilling the terms of the subcontract or working arrangement, acted reasonably to integrate the sub into the project team, documented efforts (if adequate work time as determined by the Project manager) remains to replace the DBE with another DBE, and reported the DBE problems to MaineDOT Project Manager/DBE Liaison Officer.

Under no circumstance is a Prime obligated to continue the subcontract of a DBE not meeting terms of the subcontract (as defined in the subcontract). When MaineDOT considers an item as incidental and no specific subcontract is required, MaineDOT will accept as documentation the agreed upon work provided it is spelled, including terms on a purchase order or letter of agreement.

When a Prime can substitute another DBE to fulfill the subcontract, it shall do so without added cost to MaineDOT. In any case, Primes shall furnish Project Management and DBE Liaison Officer with written documentation substantiating allegations of impropriety/derelection prior to removing any DBE. Nothing in the above prohibits a Prime from immediate removal of a DBE when Federal/State criminal/civil violations have been found.

Any changes to a subcontract must be coordinated with Project Management and documented through process of change orders.

In cases where a DBE firm believes it is being discriminated against, it's work is not being integrated/considered, or is being treated adversely by the Contractor/Consultant, the DBE

should document its concerns/issues in writing - citing date, time, personnel involved and specific matter and submit said documentation to the Contractor/Consultant's management/CEO or in the case, of civil rights violation directly to the Company's EEO Officer. Copies may be provided MaineDOT Project Management; however, first course of action is directly with the Contractor. While MaineDOT is not a party to subcontractor /consultant agreements, the DBE Liaison may interview parties in an attempt to resolve issues or may refer the matter to appropriate Federal/State agency with jurisdiction in the matter.

A Prime as determined by the MaineDOT Project Development Director or designee, or the appropriate modal Director or designee, as not having acted in good faith to satisfy DBE participation efforts will be required to justify why MaineDOT should not take sanctions it deems appropriate under the contract.

### Counting DBE Participation

Primes must execute work according to MaineDOT Standard or Specific Project Specifications. Therefore, it is critical that the actual work to be performed by the DBE is identified on the DBE Proposed Utilization Work Plan (Consultant and Contractor version as applicable) or in the case of MaineDOT imposed contract goal on the DBE Imposed Contract form. If a DBE will perform only a partial amount of the item the Contractor must also record that information on the appropriate form. Only work *actually* performed by the DBE , including DBE Primes is creditable to the overall DBE participation level; therefore, a DBE not utilizing its own employees, equipment including owned or long-term leased trucks, will not assist the Prime in achieving DBE credit for DBE participation. DBE subcontractors/consultants and Primes are encouraged to examine Mentor/Protégé options when examining business opportunities as an approved Mentor/Protégé program is an acceptable format for developing additional expertise and getting DBE credit. Mentor/Protégé plans must be approved by the Office of Human Resources prior to a DBE commencing work. (See Attachment List).

### Credit toward DBE participation:

Manufacturer	100%	Fabricating product in a commercial plant/ factory/ foundry
Subcontractor/consultant	100%	Credit for responsibly executing by managing/overseeing with it's own workforce more than one distinct element of work (includes cost of supplies, equipment, and materials obtained by the DBE for the work of the subcontract)
Suppliers/Regular Dealers	60%	Of item value, for furnishing products/



		material incidental to specific item/ reasonable administrative fee for firm which furnishes/ applies/ delivers product to project
Trucking Owned/long-term leased	100%	Incidental to specific item
Service	Reasonable fee	Providing a service of supply

### How is DBE participation counted toward goals?

- When a DBE participates in a contract, only the value of the work actually performed by the DBE is counted toward the DBE goal.

Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph A-2 of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases/leases from the prime contractor or its affiliate).

Count the entire amount of fees or commissions charged by the DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of an MaineDOT-assisted contract, toward DBE goals, provided MaineDOT determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

- When a DBE performs as a participant in a Mentor/Protégé arrangement/joint venture, count only that portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract the DBE performs with its own forces toward DBE goals.

## Commercially Useful Function (CUF)

- Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a CUF on that contract.

A DBE performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a CUF, MaineDOT Project Manager must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction/contract/project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, MaineDOT will examine similar transactions, particularly those which the DBE does not participate or is an insignificant participant.

If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than expected on the basis of normal industry practice for the type of work involved, MaineDOT will consider the DBE is not performing a CUF.

When a DBE is presumed not to be performing a CUF as provided in paragraph C-3 of this section, the DBE may present evidence to rebut this presumption. MaineDOT may determine that the firm is performing a CUF given the type of work involved and normal industry practices.

Decisions on CUF matters are subject to review by the operating administration, but are not administratively appealable to US DOT.

### **Long-term Lease Trucks:**

Factors that determine whether a DBE trucking company is performing a CUF include: the lease is set for at least 6 months including the entire operation, scheduling, maintenance and management over employee; additionally, the lease must include leasee and lessor, truck identification number, duration of lease, monthly payment or terms, and proof of insurability; the DBE is responsible for the management and supervision of the entire trucking operation the DBE must itself own and operate at least one fully licensed, insured, and operational truck used on each particular contract;

the Prime receives credit for the total value of the service the DBE provides the contract using trucks it owns, insures, and operates using drivers it employs,

the DBE may lease trucks from another DBE firm, including an owner-operator, who is otherwise themselves is certified as a DBE.

the DBE may lease trucks from a non-DBE firm, including an owner-operator; however, the Contractor who utilizes a DBE who leases trucks from a non-DBE is not entitled to credit as a result of the lease arrangement. A Prime utilizing the DBE does not receive credit for the transportation service provided by the lessee, since these services are not provided by a DBE.

A lease agreement must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. When working on MaineDOT projects, leased trucks must at all times display the name/number of the DBE operator, and

All long-term truck or equipment leases must be submitted annually to MaineDOT, Attention: Human Resources Section by March 1 each year. Upon approval, MaineDOT Project Management will be furnished the listing of approved leased trucks. Each agreement is approved on an annual basis. Trucking businesses must furnish proof of lease agreements each year before a Contractor can receive DBE credit for their work. Only those approved agreements will be eligible for credit; and

Under no circumstances shall credit be allowed for the operation of equipment which is not under long-term lease, and only the actual fee charged in the administration of the operation will be creditable; and

Long-term leased trucks shall not be owned/controlled by the Prime or any subsidiary. Operators of long-term leased trucks must be employees of the DBE firm.

**Suppliers/Regular Dealers:**

Count expenditures with DBEs for materials/supplies toward DBE goal in the following way:

If the materials or supplies are obtained from a **DBE manufacturer**, count **100** percent of the cost of the materials or supplies toward DBE goals.

For purposes of this paragraph (E), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises the materials/supplies/articles/equipment required under the contract and of the general character described by the specifications.

If the materials/supplies are purchased from a **DBE regular dealer**, count **60** percent of the cost of the materials or supplies toward the DBE goal. (Proof required).

For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials/supplies/articles/equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. (Proof required).

To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in the paragraph (E) only if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement (approved by MaineDOT) and not on an ad hoc or contract-by-contract basis.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not considered regular dealers within the meaning of this paragraph (E).

With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement or the materials and supplies, or fees for transportation charges for the delivery of materials or supplies required on the jobsite, toward the DBE goal, provided MaineDOT determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials/supplies toward DBE goals.

Only firms currently certified as a DBE at the time of execution of the contract, will have work counted toward the DBE goal.

Do not count toward the goal the dollar value of work performed under a contract with a firm after it has ceased to be certified. Work performed while certified is extended pursuant to the above formulas. MaineDOT will make every effort to provide “timely” notice to Primes of affected firms.

### Information Collection and Reporting

**Bidders List:** 49 CFR Part 26, requires bidders provide (MaineDOT) information about all DBE and non-DBE subcontracting firms which annually quote a Contractor for MaineDOT work. Contractors must furnish bidder information (see Attachment List) including the name, address, DBE/non-DBE status, age of firm, and annual gross receipts of firms. This is applicable to construction businesses who quote/bid as same. Consultant/supplier/dealer/manufacturer information is not required. The bidder list data will assist MaineDOT in identifying opportunities made available to DBE and non-DBE firms alike throughout the year. This information, required by section 26.45 of 49 CFR, will assist MaineDOT in calculating the overall DBE participation level. Primes are responsible to provide MaineDOT the information annually. Primes should acquire the bidder information annually. Primes are to use the Annual Bidder Information form to acquire data. (See Attachment List). **DO NOT HAVE BIDDERS SEND INFORMATION DIRECTLY TO MaineDOT.** Primes may include the requirement for bidder information as a provision of bidding with each bidder.

**Monitoring Payments to DBE firms:** as part of the DBE program Contractors/Consultants must maintain documentation of payment records made DBE firms for at least three years following completion of their performance on a subcontract. The Contractor/Consultant will make these records available for inspection upon request by representatives of MaineDOT/US DOT.

## **Confidentiality**

MaineDOT will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal and Maine law. Maine Freedom of Information Act (see Attachment List), safeguards certain information from release and MaineDOT will not release personal financial information submitted in response to the personal net worth as contained in the certification application to a third party, (does not apply to US DOT) without expressed written consent.

# **ATTACHMENTS TO FOLLOW**